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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-189

JUDY WARD SMITH, ... Petitioner

VS.

KENTUCKY STATE
BAR ASSOCIATION, ... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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BAR ASSOCIATION, ... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of Kentucky entered in the above-titled case on February 2, 1973, petition for rehearing denied on May 4, 1973.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix, *infra*, pp. 1a-5a.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on February 2, 1973. A petition for rehearing was denied May 4, 1973. On May 22, 1973, the execution of the Mandate was stayed to

August 20, 1973, to enable the Petitioner to seek review of the decision in this Court. (Appendix, *infra*, p. 7a) The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

CONSTITUTIONAL PROVISION, STATUTE, AND RULES INVOLVED

United States Constitution, Amendment XIV

". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

Kentucky Revised Statutes 431.065

"(1) An attempt to commit any offense under the law of the Commonwealth, if not otherwise specifically provided for, is punishable by imprisonment in jail not to exceed twelve months or by a fine not exceeding $5,000.00, or both.

(2) No attempt shall be punishable by fine or term of imprisonment in jail exceeding that which is provided for the consummated offense."

Rules of the Court of Appeals of Kentucky

The Rules of the Court of Appeals of Kentucky applicable to disciplinary proceedings are Rules 3.130 to 3.460.* Because the provision are lengthy, they are set forth in the Appendix, *infra*, pp. 8a-23a.

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* The rules set out are the rules that were in effect during the time of the disciplinary proceedings brought against the petitioner on March 29, 1971. Effective July 1, 1971, amendments to the rules were promulgated by the Court of Appeals and the rules were renumbered.

QUESTIONS PRESENTED

1. Whether in bar disciplinary proceedings, the highest state court, which makes the final determination as to guilt and punishment, can disbar an attorney by finding the attorney guilty of acts that were not included in the original charge against her and as to which she had no notice that she would be charged?

2. In bar disciplinary proceedings, where the finding of guilt as to the underlying offense that formed the basis of the original charge and as to the additional offenses that formed the basis of the attorney's disbarment depended on the resolution of an issue of credibility, whether the administrative agency conducting the proceedings in the first instance or the reviewing court can, consistent with due process of law, rely substantially on evidence presented in a grand jury proceeding to resolve that issue adversely to the attorney?

3. Where the rules of the highest state court governing bar disciplinary proceedings prohibit the use of testimony presented before a grand jury in such proceedings, whether in a particular case grand jury testimony can be used to determine important issues adversely to the attorney if the attorney does not object to such use?

4. Where an attorney is issued a show cause order by the highest state court to show cause why the recommended punishment of six months' suspension should not be imposed, whether the highest state court, which makes the final determination as to punishment,

can, consistent with due process, enter an order disbarring the attorney?

STATEMENT OF THE CASE

The petitioner, an attorney, seeks review of the judgment of the Court of Appeals of Kentucky entered on February 2, 1973, permanently disbarring her from the practice of law in that state, and contends that the manner in which the disciplinary proceedings were conducted resulted in multiple violations of her due process rights.

Petitioner was admitted to the Kentucky Bar in September, 1967. In February, 1968, petitioner moved to Perry County, a small rural county in southeastern Kentucky, with her husband and two-month old son. She set up practice on her own in April, 1968, and was the only woman lawyer in the county and one of two women attorneys in a thirteen-county area of Appalachian Kentucky. Her practice consisted of representing women in divorce actions and other cases and in serving as court-appointed counsel in criminal matters. Petitioner practiced there until December, 1969. In February, 1970, the Perry County Grand Jury returned three indictments against the Petitioner, charging her with obtaining money under false pretenses, forgery, and removal of court records. Following the indictments the petitioner returned to Perry County and retained counsel.

The events that formed the basis of these charges arose out of petitioner's representation of Mrs. Sally

Fugate in Perry County, Kentucky, in 1968 and 1969. Sally Fugate was the mother of Everett Fugate, who died intestate without issue, leaving as his heirs his mother and his wife, Odessa Fugate Jones. One of the assets of the estate was a house and lot to which the mother desired to acquire title. The petitioner represented Sally Fugate in the settlement of the decedent's estate, and in that connection, in April, 1969, filed a suit against Odessa Fugate Jones, the administratrix. In August, 1969, Sally Fugate told the petitioner that she and Odessa Fugate Jones had agreed on a settlement of the litigation as a part of which Mrs. Jones would deed the house and lot in question to Mrs. Fugate. At Mrs. Fugate's request the petitioner prepared the deed. The petitioner advised Mrs. Fugate that the sale would have to be approved by the Circuit Judge in light of the pending suit, and Mrs. Fugate told the petitioner that she would take the deed to Mrs. Jones to sign and then have it signed by the Circuit Judge and file it. Petitioner subsequently filed an accounting of the estate with the Circuit Court and assumed that the matter was closed. A copy of the accounting was furnished to the Trial Committee and made a part of the record in the case. Petitioner did not hear from Mrs. Fugate subsequently. (Appendix, *infra*, p. 55a)

On the date of trial, May 14, 1970, the state's attorney offered to dismiss all of the charges and to permit petitioner to plead to an amended charge of attempt to commit an offense under the laws of the state of Kentucky, a misdemeanor, Kentucky Revised Sta-

tutes 431.065, supra, with promise of the state's recommendation of a twelve months' probated sentence. On the advice of counsel, a senior member of the Perry County Bar, and petitioner's own assessment of her chances of prevailing before the jury, she entered a plea to the amended charge and received the probated sentence.[1]

After these events the petitioner returned to Bowling Green, Kentucky, where it was discovered in July, 1970, that her husband was suffering from a severe pituitary tumor, which resulted in his death in August, 1970. No disciplinary proceedings were initiated against the petitioner following her plea of guilty. However, on March 29, 1971, the Kentucky State Bar Association did institute disciplinary proceedings, charging that the petitioner had pleaded guilty to attempting to commit an offense under the laws of Kentucky, and that such action constituted unethical and unprofessional conduct on her part. (App., *infra*, p. 24a) The petitioner was not charged with having obtained money under false pretenses from a client, or with forgery or with removal of court records.

Petitioner's response to the charge filed by the Bar Association was that she did not commit that offense to which she pleaded. It was her theory that her husband who was at that time suffering from the tumor which subsequently resulted in his death, had forged a check from Mrs. Sally Fugate to the petitioner

1. The Court of Appeals failed to indicate in its opinion that the sentence had been probated.

as escrow agent in the amount of $632.72, forged the petitioner's endorsement on the check, and cashed the check, retaining the proceeds himself. The proceeds of the check were purportedly to be turned over to Odessa Fugate Jones in settlement for the transfer of the house and lot belonging to Everett Fugate. In addition, it appeared that a deed transferring the house and lot, which, according to the petitioner, was not the deed that she had prepared, had been filed in the Perry County Court Clerk's Office with the forged signature of the Perry Circuit Judge affixed to it.[2] It had subsequently been removed from the records. The indictments against the petitioner charged her with having committed these offenses.

The motivation for this seemingly bizarre behavior by the petitioner's husband was, in her view, related to the fact he was suffering a personality displacement caused by the then unknown severe pituitary tumor. He believed that the petitioner was going to

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2. The petitioner testified before the Trial Committe that she did not prepare the deed that was filed in the County Court Clerk's office and introduced into evidence a copy of the deed that she had prepared. (App., *infra*, p. 52a) The deed that the petitioner prepared had spaces for the signatures of Sally Fugate and Odessa Fugate Jones and recited that the petitioner prepared the deed. It also had a space for the approval of the Circuit Judge. The deed that was filed by Mrs. Fugate was signed only by the Circuit Judge (the signature was forged) and not by the parties. The Trial Committee made no findings with respect to the preparation of the deed, but the Court of Appeals stated that the deed prepared by the petitioner was the one that was filed in the County Clerk's office (App., *infra*, p. 2a).

commit him to a mental hospital, divorce him and forget about him, and thus as a last ditch effort, he decided upon this scheme to irreparably damage her ability to earn a livelihood and support herself and their son. In December, 1968, Mr. Smith was discharged by his employer, R. J. Reynolds Tobacco Company for misappropriation of company funds, and since that time he had been very hostile to the petitioner and their son. From December, 1968, until the date of his death in August, 1970, he gained approximately fifty pounds, did not work, slept between fourteen and sixteen hours a day, and became extremely jealous of her and their young son. He would also disappear for days at a time and gave insufficient fund checks to various local businessmen, which petitioner covered. She detailed other acts of bizarre behavior on his part and testified that after she was indicted, he said to her: "I fixed you, you won't practice law much longer in the State of Kentucky. Tell me what prison they send women to in Kentucky — Eddyville or LaGrange." (App., *infra*, p. 47a) The petitioner supported her theory of her husband's involvement with a detailed statement of his behavior during this time period. The petitioner also provided the Trial Committee with the following evidence in support of her contention: (1) her husband had cashed checks made to her before by endorsing them in her name, and she provided the Trial Committee with an example of such check and his writing of her signature, (2) the check was negotiated at her husband's bank, Citizens State, while Petitioner did all of her banking with People's Bank, the other bank

in Hazard, Perry County, Kentucky, (3) that the bank teller did not recall her tendering the check for cashing. (App., *infra*, p. 28a)

At the hearing before the Trial Committee, both the Bar Association and the Petitioner, as well as the Trial Committee, proceeded on the assumption that the only issue was the petitioner's plea in mitigation, i.e., that she did not prepare and cash a check from Sally Fugate in the amount of $632.72. There was no inquiry by the Committee as to whether the petitioner was the person who forged the Circuit Judge's name on a deed or the one who removed the deed from the Clerk's office. It should also be noted that throughout these proceedings the Bar Association was insisting that the Trial Committee could not go behind the plea of guilty even in mitigation.

The Trial Committee did not call Mrs. Fugate as a witness, although the petitioner testified that Mrs. Fugate was living in Perry County and that she had not talked with the petitioner about the check in question. (App., *infra*, p. 28a) The petitioner, who was representing herself before the Trial Committee, candidly informed the Committee that Mrs. Fugate had testified before the Perry County Grand Jury, which was investigating the removal of the deed from the files and the forgery of the Judge's signature, to the effect that the petitioner was the person who had prepared the check and that the petitioner was to remit the proceeds to Mrs. Jones. However, Mrs. Fugate did not testify before the Grand Jury that she ever discussed this matter with the petitioner or demanded

an explanation as to why the proceeds had not been turned over to Mrs. Jones. The petitioner had in her possession a copy of the grand jury proceedings, which was turned over to the Trial Committee and made a part of the record. (App., *infra*, p. 62a)

The petitioner also informed the Committee that she employed a handwriting expert, Maxwell Allen, to look at the check in question to determine whether it was her handwriting. He made a report to her attorney, and it was her recollection that he said that he could not make such a determination. The Committee called Mr. Allen as a witness, and he testified that his statement to her attorney was that "purported signatures of, and handwriting of Mrs. Smith at that time compared favorably with that on the check." (App., *infra*, p. 64a) No effort was made by the Trial Committee to compare the purported signature of the petitioner on the check with the signature on the check admittedly signed in her name by her late husband, which she had furnished to the Committee.

The Trial Committee issued its Report on May 23, 1972. It found that the petitioner had prepared and cashed the check in question and that no part of the proceeds had been paid over to Mrs. Jones. It made no findings with regard to the forgery of the Circuit Judge's signature or the removal of the deed from the Clerk's office, since these matters were not in issue, and there was nothing, even in the transcript of the grand jury proceedings, that connected petitioner with either of those acts. The Trial Committee stated that it was considering "mitigating circum-

stances" and recommended a three-year suspension. (App., *infra*, p. 39a)

The Board of Governors received the Trial Committee's findings and entered its order on July 14, 1972. It considered the mitigating circumstances of (1) petitioner's inexperience as an attorney, (2) the physical infirmity of her husband, James Allen Smith, during said period, which resulted in his death, (3) consideration of the fact that Respondent now has the responsibility of rearing and educating the infant son of her marriage, (4) having made full restitution to her client, Sally Fugate, and (5) her previous good character and conduct, both as an individual and attorney." (Appendix, *infra*, p. 39a). The Board found that the petitioner was "guilty as charged of unprofessional conduct" and recommended a six months' suspension from the practice of law.

The Court of Appeals then issued a rule on July 21, 1972, directing the petitioner to "show cause why the recommendation of the Board should not be enforced by appropriate orders of the Court." (App., *infra*, p. 43a) Petitioner duly filed a response to the show cause order, and after briefing, the Court of Appeals entered its judgment on February 2, 1973. It found that the petitioner was guilty of "multiple offenses" and had also committed perjury "in her attempt to extricate herself from these charges." (App., *infra*, pp. 3a-4a) It stated that three crimes had been committed: the obtaining of money under false pretenses, the forgery of the Circuit Judge's signature, and the removal of the deed from the Clerk's Office (App., *infra*, pp. 2a-3a)

and found that the petitioner was guilty of these three offenses, **notwithstanding that the petitioner had not entered a plea as to any of these offenses — indeed they had all been dismissed — and that she had not been charged with committing any of these offenses by the Bar Association.** In addition it added another new charge, that of perjury, which would necessarily be based on the conflict between the petitioner's testimony before the trial committee and the witness testimony that was contained in the Perry County Grand Jury Record, **despite the fact that the petitioner never had the opportunity to confront or cross-examine the witnesses who testified before the Grand Jury and that these witnesses were also not examined by the Trial Committee.** It concluded that: "The offenses are multiple; they are too serious in nature and reflect a degree of dishonesty totally abhorrent to all principles enunciated in the code of ethics of the legal profession." It then ordered that the petitioner be permanently disbarred from the practice of law in Kentucky. (App., *infra*, p. 5a).

Petitioner filed a Petition for Rehearing, arguing multiple violations of her due process rights in the disciplinary proceedings in that (1) the Court of Appeals found that the petitioner had committed "multiple offenses" when the charge accused her of committing but one offense, and she had not been charged with committing any of the offenses of which she was found guilty; (2) Consideration by the Court of Appeals of Kentucky of a transcript of proceedings before the Grand Jury of Perry County, at which neither

the Petitioner nor her counsel was present, denied Petitioner the rights of cross-examination and confrontation of witnesses against her, in violation of due process of law under the 14th and 6th Amendments to the federal constitution and under the Rules of the Court of Appeals as to disciplinary proceedings, (3) The finding of perjury by the Court of Appeals was a finding by the Court of professional misconduct, which was not a subject of any pending charge against her, and denied her due process of law by failing to give her adequate notice of such charge and a hearing on such charge and (4) The judgment of permanent disbarment was a denial of due process of law, since the petitioner was only ordered to show cause why she should not be suspended from the practice of law for a period of six months. The Petition for Rehearing was denied on May 4, 1973 without comment.

REASONS FOR GRANTING THE WRIT

I.

This case raises substantial questions concerning due process in bar disciplinary proceedings, an area of extreme importance to the legal profession and the public at large, in which guidelines must be furnished by this Court.

Although this Court has recognized the right of an attorney to procedural due process in bar disciplinary proceedings, *In re Ruffalo*, 390 U. S. 544,550 (1968), it has not definitively set forth guidelines which must be

followed by bar disciplinary agencies and reviewing courts in such proceedings in order to assure that this right is a meaningful one. Procedures in bar disciplinary proceedings vary widely from state to state and are inconsistently administered even within a single jurisdiction. As pointed out by the American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement, chaired by former Justice Tom C. Clark, "We are still faced with a lack of uniformity so extensive that there are nearly as many disciplinary structures in this country as there are disciplinary jurisdictions. Report on Disciplinary Enforcement, p. 166 (1970). The multiple problems inherent in bar disciplinary proceedings raise the fundamental question of whether the legal profession can discipline its members in such a way as to protect the public and at the same time guarantee an accused attorney a fair and impartial hearing, consistent with due process standards.

If the legal profession is to continue to discipline itself, at a minimum there must be uniformly recognized standards of fair procedure, and it is submitted that these standards must be established by this Court. In bar disciplinary proceedings, perhaps more so than in any other area, "It is procedure that marks much of the difference between rule of law and rule by fiat." *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971). In the case at bar the petitioner was found guilty by the reviewing court of acts that were not included in the original charge against her and as to which she had no notice that she would be charged. A crucial issue of credibility was resolved adversely to the petitioner by reliance on evidence

presented in a grand jury proceeding, in violation of the state's own rules, effectively denying the petitioner the right of confrontation and cross-examination. The penalty recommended by the Board of Governors was a six month suspension, and the petitioner was ordered to show cause why this penalty should not be imposed, but instead the reviewing court imposed a penalty of permanent disbarment.

This Court should make clear what due process requires in bar disciplinary proceedings and should furnish guidelines for the state disciplinary agencies to follow in such cases. Substantial questions in this regard are presented in the case at bar, justifying a grant of certiorari by this Court, to insure that discipline will be administered in a responsible manner throughout the states, thereby implementing the interest of the public and the profession in providing appropriate discipline dispensed with due process of law.

II

The holding of the Kentucky Court of Appeals, which makes the final determination as to guilt and punishment in bar disciplinary proceedings, to the effect that it can disbar an attorney by finding the attorney guilty of acts that were not included in the original charge and as to which she had no notice that she would be charged, is clear-

ly not in accord with applicable decision of this Court.

The charge against the petitioner that was filed by the Kentucky State Bar Association read as follows:

> "About May 14, 1971, respondent [petitioner herein] was convicted in the Perry County Kentucky Circuit Court, upon her plea of guilty, to the charge of an attempt to commit an offense under the law of the Commonwealth of Kentucky as provided by KRS 431.065 . . .
>
> WHEREFORE, complainant charges that such facts and actions on the part of respondent constitute unethical and unprofessional conduct . . ." (App., *infra*, p. 24a)

This was the only charge filed against the petitioner, and in going behind the plea of guilty, which the Trial Committee had the power to do (App., *infra*, p. 4a),[3] the Committee limited its inquiry entirely to the question of whether the petitioner prepared and cashed Sally Fugate's check in

3. The petitioner contended that she did not commit that offense but pleaded guilty in exchange for the recommendation of a probated sentence after assessing her chances of prevailing before the jury. The Court of Appeals held that while the Trial Committee could not go behind the plea to find that the petitioner was innocent of the offense, it could do so "in order to determine just what facts the defendant is or was guilty of." (App., *infra*, p. 4a) The Trial Committee found that in fact the petitioner had committed the offense of obtaining money under false pretense by cashing the check and not turning the proceeds over to Odessa Fugate Jones.

the amount of $632.72. There was no consideration by the Trial Committee as to whether the petitioner was the person who forged the Circuit Judge's signature on the deed or removed the deed from the Clerk's office and there was no evidence, even in the transcript of the grand jury proceedings, that connected the petitioner with those transactions.

While pleading guilty to a misdemeanor offense would subject an attorney to disciplinary punishment, it would not, standing alone, justify the extreme penalty of permanent disbarment, particularly where, as here, the Trial Committee and the Board of Governors found that mitigating circumstances were present. See *e.g., In re Carroll*, Ky., 406 S.W.2d 845 (1966); *In re Gordon*, Ky., 402 S.W.2d 854 (1965).[4] In order to justify the imposition of that penalty in the case at bar it was necessary for the Court of Appeals to find that the petitioner had committed "multiple offenses" and had also com-

4. In the *Carroll* case the attorney had been convicted of the federal offense of receiving stolen goods that had moved in interstate commerce, a felony. He was suspended for two years. In the *Gordon* case, the attorney had pleaded guilty to an assault on another attorney and was found by the Trial Committee to have committed three additional charges of improper conduct. He was suspended for six months. As to the imposition of disciplinary punishment for failure to pay over clients' funds see *e.g., Kentucky State Bar Association* v. *Smith*, Ky., 439 S.W.2d 56 (1969), where an attorney who was found guilty of failing to properly keep and pay over money deposited with him by a client to be paid over to a trustee in bankruptcy and of failing to properly apply money received on behalf ot another client incident to the settlement of litigation and of two other offenses was meted a one year suspension.

mitted perjury. (App., *infra*, p. 3a) In so doing, it necessarily found the petitioner guilty of offenses with which she had not been charged. Stated simply and starkly, the Court of Appeals "made the crime fit the punishment."

Its action in this respect was clearly inconsistent with the tenor of this Court's decision in *In re Ruffalo*, 490 U.S. 544 (1968). In that case, on the basis of evidence brought out at the administrative hearings, an additional charge was added and the attorney was found guilty of that charge. The reviewing court found him guilty of that charge and one other and concluded that the two violations required disbarment. In holding that the attorney was denied due process this Court stated:

> "The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.
>
> The absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U. S. at 551-2.

See also *Committee on Professional Ethics and Grievances* v. *Johnson*, 447 F.2d 169 (3rd Cir. 1971); *Jaffee & Co.* v. *Securities and Exchange Commission*, 446 F.2d 387 (2d Cir. 1971).

In the case at bar the denial of due process was even more extreme, since the new charges were not added by the Trial Committee (thereby giving the petitioner at least a belated chance to rebut them) but by the reviewing court. The Court of Appeals found that the petitioner was guilty not only of obtaining money from Sally Fugate under false pretenses, but that she had also forged the Circuit Judge's signature on the deed and had illegally removed the deed from the Clerk's office. There was no contention by the Bar Association that the petitioner had committed either of these acts, and the issue of her having done so was not litigated before the Trial Committee. All of the evidence at the hearing revolved around the question of whether the petitioner had prepared and cashed Sally Fugate's check. There was likewise nothing in the transcript of the grand jury proceedings that remotely connected the petitioner with those transactions. In bar disciplinary proceedings the burden of proof rests on the bar association and the facts must be proved by a preponderance of the evidence. Rules of the Court of Appeals of Kentucky 3.350 (App., *infra*, p. 17a). There is no evidence in the record that would support a finding of guilty on these charges, and even apart from the fair notice requirement, to impose punishment on the basis of such a finding in quasi-criminal proceedings such as these, *In re Ruffalo*, *supra*, would be violative of due process of law. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 248 (1961); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969). In any event, the petitioner clearly was given no notice that she was being charged with having committed these offenses

and was given no opportunity to defend against them. She went through the hearings before the Trial Committee believing that she had fairly met the substance of the only charge leveled against her, *i.e.*, that she was guilty of "unethical and unprofessional conduct" because of her plea of guilty to attempting to commit an offense under the laws of Kentucky, and she had presented her case in mitigation as to that charge. To this extent she had been "lulled into a false sense of security," *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964), and would not expect that additional charges would be leveled against her.

Likewise the petitioner had no notice that she would be charged with perjury — the strongest basis for disbarment — if she attempted to go behind the plea of guilty and show that she did not commit any offense. As in *Ruffalo*, petitioner had no notice that she could be "by her own testimony, irrevocably assuring her disbarment under charges not yet made." 390 U.S. at 551. The charge of perjury is particularly important here. It was the petitioner who originally sought to go behind the guilty plea in the hope of mitigating the punishment that would be imposed. She was representing herself and could not help but realize that her explanation of what had occurred would appear, to say the least, "unusual." If she had known that she would face a charge of perjury and the penalty of disbarment if the Trial Committee disbelieved her, she might well have chosen to "take her chances" with the plea on its face. Clearly the petitioner did not have "fair notice as to the reach of the grievance

procedure and the precise nature of the charges." *In re Ruffalo, supra.*

The action of the Kentucky Court of Appeals in disbarring the petitioner by finding her guilty of acts that were not included in the original charge and as to which she had no notice that she would be charged is clearly not in accord with applicable decisions of this Court, justifying the grant of certiorari.

III.

This Court should grant certiorari to determine the substantial question of whether in bar disciplinary proceedings, where the finding of guilt as to the underlying offense that formed the basis of the original charge and as to the additional offenses that formed the basis of the attorney's disbarment depended on the resolution of an issue of credibility, the administrative agency conducting the proceedings in the first instance or the reviewing court can, consistent with due process of law, rely substantially on evidence presented in a grand jury proceeding to resolve that issue adversely to the attorney.

The crucial issue in the disciplinary proceedings in view of the petitioner's plea of mitigation was whether the petitioner did or did not prepare and endorse a check of Sally Fugate's in the amount of $632.72. The petitioner denied having done so, and the Court of Appeals stated: "Her contentions are

refuted by the sworn testimony of a large number of witnesses. Sally Fugate testified that respondent [petitioner herein] prepared all of the papers in question including the check and that the check was delivered to the respondent. Rosie Stacy, daughter of Sally Fugate, accompanied her to respondent's office and was present when the check was made out and witnessed the entire matter." (App., *infra*, p. 3a)[5] However, the "sworn testimony" to which the Court of Appeals refers was that contained in proceedings before a Grand Jury, at which the petitioner, of course, was not present, and the testimony was never subject to cross-examination. Moreover, Sally Fugate did not testify before the Grand Jury that she had ever discussed this matter with the

5. The Court also stated that, "There is unequivocal testimony in the record by a handwriting expert that the writings involved, without question, are those of respondent. An examination of the writings by this court when compared with the known writing of respondent reveals without question that she prepared the documents." (App., *infra*, p. 3a) In point of fact the handwriting expert, Maxwell Allen, only testified that "purported signatures of, and handwriting of Mrs. Smith at that time compared favorably with that on the check." (App., *infra*, p. 64a) The petitioner contended that her late husband, who had on other occasions signed her name on a check, signed her name on the check in question, and she produced a check with the signature on the check admittedly signed in her name by her husband. No effort was made by the Trial Committee to compare the purported signature of the petitioner on the check in question with her husband's signing of her name. If the petitioner was correct in her contention that her husband could sign her name in substantially the same way she did, the signature on the check in question would "compare favorably' with the signature of the petitioner.

petitioner or demanded that the petitioner explain why the proceeds had not been turned over to Mrs. Jones. The failure of Mrs. Fugate to even contact the petitioner in regard to the transaction casts serious doubt on her statement that the petitioner was the person who had prepared the check. What is far more likely is that the check was prepared by the petitioner's late husband and that he represented to Mrs. Fugate that he was doing so on the instructions of the petitioner. When Mrs. Fugate and her daughter were called before the Grand Jury, they were reluctant to disclose this fact since petitioner's husband was not an attorney, and thinking that it would make no difference, testified that the check was prepared by the petitioner.

What happened here, pure and simple, was that the Trial Committee resolved a crucial issue of credibility against the petitioner without ever having seen the persons giving the conflicting testimony and without affording the petitioner the right to cross-examine them.[6] It may well have been that if Sally Fugate had been called as a witness by the Trial Committee, she would have admitted that it was the petitioner's husband and not the petitioner who prepared the check. As will be discussed in more detail subsequently, the reliance on Grand Jury testimony in bar disciplinary proceedings was in flat violation of the Rules of the Court of Appeals. But the Court of Appeals not only accepted the Committee's findings based

6. The only "live" evidence before the Trial Committee was the testimony of the petitioner and the testimony of the handwriting examiner, Maxwell Allen.

on such testimony, but compounded the violation of its own rules by relying on such testimony to conclude that the petitioner had committed perjury.

Whether evidence presented in a grand jury proceeding can be relied on to resolve a crucial issue in a bar disciplinary proceeding adversely to the attorney clearly is a "question of substance not theretofore determined by this Court." The question is presented most strikingly in the present case, since such evidence was relied on by the Trial Committee to resolve an issue going to the credibility of witnesses — as to which face to face confrontation and cross-examination is of utmost importance[7] and by the reviewing Court to support a finding of perjury against the petitioner and to justify her permanent disbarment. There is also an added dimension in the case at bar, since the use of such evidence was prohibited by the Court of Appeals' own rules.

In *Richardson* v. *Perales*, 402 U.S.390 (1971), this Court held that physicians' written reports of medical examinations they had made of a disability claimant could constitute "substantial evidence" supportive of a finding of nondisability. The Court emphasized that the physicians had no interest in the outcome of the proceeding, that the reports were routine and that there was no inconsistency between the reports of the various specialists only differences as to interpretation, that the claimant had the burden of proof on the issue of disability

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7. None of these persons were dead or otherwise unavailable, and all could have been subpoenaed by the Trial Committee.

and could have requested that the physicians be subpoenaed, that the reliability and probative value of such reports had long been recognized and finally that the magnitude of disability claims made reliance on written medical reports necessary. Where such factors are not present, confrontation and cross-examination are more likely to be required, and reliance on extra-judicial evidence not permitted. See *e.g., Blackwell College of Business* v. *Attorney-General*, 454 F. 2d 928 (D.C. Cir. 1971)

What process is "due" depends upon the "precise nature of the government function involved as well as of the private interest that has been affected by a governmental action." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). If welfare benefits cannot be terminated unless the beneficiary has "an effective opportunity to confront any adverse witness," *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), an attorney, whose license to practice law represents a valuable property right, *Spevack* v. *Klein*, 385 U.S. 511 (1967), should be entitled to the same confrontation before an important issue of credibility is resolved against her. This is all the more so in a proceeding in which the Bar Association has the burden of proving the charge by a preponderance of the evidence. (App., *infra*, Rule 3.350 p. 17a) The right to confrontation and cross-examination becomes absolutely indispensable where, as here, the resolution of the issue against the attorney results in a finding that she is guilty of perjury and the imposition of the penalty of permanent disbarment.

The petitioner had no reason to suppose that the Trial Committee was doubting her credibility. In the proceedings before the Trial Committee the Bar Association contended that evidence as to the petitioner's innocence or guilt was irrelevant and that discipline should be imposed on the basis of her plea of guilty. If the Trial Committee was going to resolve a crucial issue of credibility against the petitioner, it was incumbent on them to summon Sally Fugate as a witness, so that she could be examined by them personally and be cross-examined by the petitioner. Instead it relied on the transcript of the Grand Jury proceedings, which the petitioner furnished at its request, and concluded, as did the Court of Appeals, that Sally Fugate's testimony before the grand jury was accurate and that the petitioner was lying. All of this was in violation of the Court of Appeals own rules. If attorneys do have the right to confrontation and cross-examination in bar disciplinary proceedings, the transcripts of Grand Jury proceedings cannot be relied on to prove that attorneys have committed criminal offenses, are guilty of perjury and should be disbarred.

This Court should grant certiorari to resolve this important question.

IV

This Court should grant certiorari to determine the substantial question of whether, where the rules of the highest state court governing bar disciplinary proceedings prohibit the use of testimony before a grand jury in such proceedings, such testimony can be used to determine important issues adversely to the attorney if the attorney does not object to such use.

The Rules of the Kentucky Court of Appeals applicable to bar disciplinary proceedings exclude the use of testimony taken at grand jury proceedings. Transcripts of "other proceedings" can be used as evidence in disciplinary proceedings only when the evidence was taken under oath, the attorney involved had notice, and appeared either in person, by counsel or as an attorney for a party. Rules of the Kentucky Court of Appeals 3.360 (App., *infra*, p. 17a) The Trial Committee blatantly disregarded this rule when it received the transcript of the grand jury proceedings into evidence and based its finding on the crucial issue of whether the petitioner prepared and cashed the check in question on the testimony of Sally Fugate and her daughter Rosie Stacy, before the grand jury. The Court of Appeals went even further and relied on the grand jury testimony to support a finding that the petitioner had committed perjury.

The failure of the government to follow its own rules and regulations when dealing with a citizen is the clearest violation of due process of law. *Service* v. *Dulles*,

354 U.S. 363 (1957). The question presented in the case at bar is whether the due process violation is vitiated when the bar authorities and the courts do not follow their own rules in disciplinary proceedings if the attorney does not object. It is submitted that the duty of the government to follow its own rules is a non-waivable duty owed to the society as a whole and not merely to the individual involved. To sanction a violation because the individual involved does not object can only encourage the government to violate its own rules when it finds them "inconvenient" to follow. This is especially so when there is a felt pressure to "go along" with what the government wants.

This danger is clearly demonstrated in bar disciplinary proceedings, where the agency that must decide whether to follow the rules is also the agency that determines guilt and recommends punishment. In the case at bar the petitioner was admittedly subject to disciplinary punishment because of her plea of guilty to the crime of attempting to commit an offense. Her only hope was to make out a strong case of mitigation and to impress the Trial Committee with her sincerity and willingness to cooperate with them in any way. When the Committee made clear its desire to consider the grand jury transcript, which the petitioner had in her possession, and to have it introduced into evidence, she was in no position to refuse. If petitioner had been represented by counsel, as in retrospect she should have been, counsel might have objected, but this was a posture that the petitioner could not take.

Moreover, the petitioner had no way of knowing that the Trial Committee was going to use the grand jury transcript to resolve a crucial issue of credibility against her, and certainly had no basis for believing that the Court of Appeals was going to use it to find that she had committed perjury and disbar her. Even if it were possible for there to be a "waiver" of the government's duty to follow its own rules, the "waiver" would apply only to the charge as to which the government was purportedly acting and not to charges that were never made until the final step in the proceedings.

This Court should hold that the duty of the government to follow its own rules and regulations applies whenever the government acts, and that in bar disciplinary proceedings disciplinary committees and reviewing courts must follow the rules that have been promulgated for such proceedings. Any other standard will encourage widespread violation of this elementary principle of due process. This Court should grant certiorari to resolve this important question.

V.

This Court should grant certiorari to determine whether, when an attorney is issued an order by the highest state court to show cause why she should not be suspended for six months, the court can, consistent with due process, enter an order disbarring the attorney.

There is something "fundamentally unfair" in a court's issuing an order to an attorney to show cause

why she should not be suspended from practice for six months and after she has tried to do so, entering an order permanently disbarring her from the practice of law. When the petitioner "came away" from the Board of Governors, so to speak, she faced a punishment of six months' suspension. While it is true that the recommendation of the Board of Governors to the Court of Appeals was advisory only, and while the Court of Appeals is the final arbiter as to guilt and punishment, nonetheless, in these circumstances an attorney does not think that she will "come away" from the Court of Appeals being permanently disbarred from the practice of law. It is submitted that the due process requirement of "fair notice" in bar disciplinary proceedings also includes notice that the reviewing court is considering imposing a qualitatively different punishment from that recommended by the disciplinary committee. It is also submitted that due process requires that an attorney be specifically informed in advance when the reviewing court is considering imposing the ultimate penalty of permanent disbarment.

If the petitioner had known realistically that she was facing permanent disbarment when the case came before the Court of Appeals, there is certainly a great likelihood that she would have proceeded differently. At a minimum she probably would have retained an attorney to represent her. How she would have handled the case if she had been specifically informed of what she was facing, "no one knows." *In re Ruffalo, supra,* 390 U.S. at 544.

It was certainly reasonable for the petitioner to expect that a penalty of the same nature as that recommended by the Board of Governors would be imposed. This is particularly so here, since so far as she knew up until the time the case came before the Court of Appeals, she was only being charged with "unethical and unprofessional conduct," and the only issue that had been resolved against her went to the issuance of the Fugate check. She did not know that she was facing disbarment on the basis of other charges, including perjury. If the Court of Appeals had been required to give the petitioner notice that she was facing the penalty of permanent disbarment, it would also have been required to inform her that she was facing "multiple charges" that had not been made against her previously. Truly the show cause order "lulled her into a false sense of security." *Bouie* v. *City of Columbia, supra.*

It is submitted that when the reviewing Court issues an order to an attorney to show cause why she should not be suspended for six months, it has necessarily imposed a self-limitation on the possible punishment, and in essence lacks "jurisdiction" to impose the ultimate punishment of permanent disbarment. It is not disputed that the reviewing court can impose such punishment; all the petitioner contends is that due process requires that it specifically inform the attorney of what she faces before such punishment is imposed.

In *In re Ruffalo, supra,* this Court held that due process required that an attorney in disciplinary proceedings be given fair notice of the charge against him. This Court should grant certiorari in the case at bar

to determine whether the fair notice requirement also necessitates that the attorney be specifically advised when the tribunal that determines punishment is considering imposing the ultimate sanction of permanent disbarment, or at least whether this is required when the recommendation of the disciplinary committee is a qualitatively different punishment of six months' suspension.

CONCLUSION

The disbarment of an attorney is a sentence to professional death. And yet it is carried out in this country by widely varying procedures that frequently fall short of those minimum standards of due process that this Court has held must apply whenever "substantial interests" are at stake. In the case at bar the petitioner's career and her reputation have been destroyed on the basis of charges that were not made and on the basis of the testimony of witnesses whom she could not confront nor cross-examine. This case raises questions of fundmental importance to the legal profession and the public whom it serves, and for this reason the Petition for Certiorari should be granted.

Respectfully submitted,

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